IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1890

LEE FRISSELL,
Petitioner

v.

FRANK L. RIZZO,
Mayor of the City of Philadelphia,
and
SHELDON L. ALBERT,
City Solicitor of the City of Philadelphia,
and
CITY OF PHILADELPHIA, PENNSYLVANIA,
Respondents

BRIEF FOR RESPONDENTS IN OPPOSITION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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BRIEF FOR RESPONDENTS IN OPPOSITION

The Respondents, Frank L. Rizzo, Sheldon L. Albert and City of Philadelphia, through their undersigned counsel, respectfully request that the instant Petition for Certiorari be denied for the reasons set forth below.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the Petitioner as a Philadelphia resident voter and taxpayer has standing as a third party to seek mandatory injunctive relief under 42 U.S.C. §1983 from the actions of the Respondents in refusing to contract with a local newspaper for discretionary advertising.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions at issue are adequately set forth in the Petition.

COUNTER-STATEMENT OF THE CASE

This action was commenced by the Petitioner as a resident voter and taxpayer against the Respondents to require them to enter into a contract with The Evening Bulletin newspaper to run what would otherwise be discretionary advertising. The Respondents' refusal to contract was prompted by the Bulletin's refusal to retract a series of incorrect news stories published by it which reflected adversely on the integrity of the Respondents. Though the actual party to the controversy, the Bulletin did not bring suit or take any position whatsoever with respect to the Respondents' actions. Instead, it was the Petitioner, as a third party, who brought suit to redress injuries supposedly suffered by him and by the Bulletin. The Petitioner did not allege in his Complaint that he was a reader of or had any other special relationship to the Bulletin, but merely that he was a citizen who would be injured by the supposed resultant chilling effect upon freedom of press in Philadelphia.

REASONS FOR DENYING THE WRIT

THE DECISION BELOW IS IN TOTAL CONFORMANCE WITH PREVIOUS DECISIONS OF THIS COURT.

The Court of Appeals found that the dispute that prompted the filing of the instant action was between the Respondents and The Evening Bulletin newspaper. Any real injury suffered as a result of the Respondents' actions was suffered by the Bulletin alone. The allegations of injury made by the Petitioner in his sole capacity as a citizen, resident and taxpayer were simply too remote and conjectual to pass constitutional muster.

This Court has noted that the threshold question in every federal case is whether the plaintiff has alleged a case or controversy within the meaning of Article III of the Constitution. *Warth v. Seldin*, 422 U.S. 490 (1975). The alleged injury must be real and immediate, and not hypothetical or abstract. *O'Shea v. Littleton*, 414 U.S. 488 (1974). Moreover, this Court has repeatedly held that Article III requires an allegation of injury that is directly traceable to the action of the defendant. *Simon v. Eastern Kentucky Welfare Rights Organization*, 427 U.S. 26 (1976); *Warth v. Seldin*, supra.

The decision of this Court in *Laird v. Tatum*, 408 U.S. 1 (1972) is dispositive of the instant action. In *Laird*, this Court considered whether a justifiable controversy was present where the plaintiffs complained of a chilling effect on the exercise of their First Amendment rights, caused, not by any specific action of the defendant against them, but by the existence and potential for abuse of an intelligence gathering system of the defendant. The plaintiffs' position in *Laird* was essentially identical to the Petitioner's herein:

> ". . . In the future it [would be] possible that information relating to matters far beyond the respon-

> sibilities of the military [would] be misused by the military to the detriment of these civilian appellants . . ." 408 U.S. at 10.

The Court found, however, that the appellants did:

> ". . . not attempt to establish this as a definitely foreseeable event, or to base their complaint on this ground. Rather, appellants [contended] that the present *existence of this system* [constituted] an impermissible burden on appellants and other persons similarly situated which [exercised] a *present inhibiting effect* on their full expression and utilization of their First Amendment Rights." 408 U.S. at 10.

Without proof of an actual present injury, this Court was compelled to find a lack of standing:

> ". . . Governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights. At the same time, however, [the cited decisions] have in no way eroded the 'established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action must show that *he has sustained* or is *immediately* in danger of sustaining a direct injury as the result of that action . . .' " 408 U.S. at 12 (Emphasis supplied)

In the instant action, the Court of Appeals properly found that the Petitioner had not met this test. The alleged chilling effect upon the Petitioner's rights arose from the Petitioner's speculative apprehension that the Bulletin would sometime in the future attempt to curry favor with the Respondents to reverse the ban on advertising. In his brief to the Court of Appeals, the Petitioner outlined quite clearly the speculative nature of his claim:

> "Newspapers and other media from whom advertising is being withheld, including the Bulletin, *may* be moved to curry the favor of the mayor in order to obtain advertising in the future. Newspapers and other media that enjoy advertising *may* wish to curry favor in order to continue to enjoy advertising and *may* wish to avoid incurring disfavor in order to avoid the sanction of withheld advertising." Brief at 11. (Emphasis supplied)

Such an allegation of subjective chill is not an adequate substitute under *Laird* for a claim of specific present objective harm or an immediate threat of such.

The holdings of this Court in *Gladstone Realtors v. Village of Bellwood*, ___ U.S. ___, 47 U.S.L.W. 4377 (decided April 17, 1979); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers' Council, Inc.*, 425, U.S. 748 (1976); *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); and *Lamont v. Postmaster General*, 381 U.S. 301 (1965), are distinguishable from the instant case because of the paucity of the Petitioner's injury, the existence of a real party in interest, and the remoteness of his relationship to that party. In its decision, the Court of Appeals found the following factual distinctions to be fatal to Petitioner's case:

1) The Petitioner did not allege in his Complaint any defined relationship or particularized interest between himself as a "hearer" and the Bulletin as the affected "speaker", as suggested in *Virginia State Bd. of Pharmacy* and *Kleindienst*. (All)

2) The Petitioner made no allegation that the Bulletin had, in fact, been silenced or even inhibited on any subject in which the Petitioner was interested. As such, the Petitioner's dependent injury could not exist. (All)

3) The Petitioner made no allegation or suggestion that the Bulletin could not assert its rights in a suit

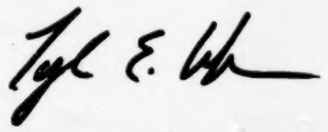
of its own. (A13) The Court of Appeals recognized that the standing to assert a right to hear is fundamentally analogous to a grant of standing to assert the rights of a third party. The allowance of such should be governed by the restriction that one may claim such standing only upon showing that some genuine obstacle has prevented the real party in interest from vindicating his own legal rights. *Singleton v. Wulff*, 428 U.S. 106 (1976); *NAACP v. Alabama*, 357 U.S. 449 (1958). The Court properly concluded that the Petitioner's failure to allege or even allude to any obstacle to the Bulletin bringing its own suit required it to conclude that the Bulletin was the better plaintiff and the Petitioner lacked standing in his own right.

The decision of the Court of Appeals upholding the District Court's dismissal of Petitioner's Complaint for lack of standing was supported totally by the previous decisions of this Court. The Courts below simply concluded that the Petitioner was only a third party to a controversy, the effects of which were neither alleged, nor could be reasonably presumed, to injure the Petitioner.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Certiorari be denied.

Respectfully submitted,



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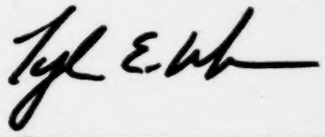
CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July 1979, three (3) copies of the Brief for Respondents in Opposition to the Petition for Certiorari were served upon counsel for petitioner listed below by mailing the same first-class, postage prepaid. I further certify that all parties required to be served have been served.



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